

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEW NGC, INC.,  
d/b/a NATIONAL GYPSUM COMPANY,  
Employer,

and

Case 25-CA-031825  
Case 25-CA-031898  
Case 25-CA-065321

UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION (USW),  
AFL-CIO, CLC,

and

UNITED STEEL WORKERS LOCAL UNION  
NO. 7-0354, a-w UNITED STEEL, PAPER AND  
FORESTRY, RUBBER, MANUFACTURING,  
ENERGY, ALLIED INDUSTRIAL AND  
SERVICE WORKERS, INTERNATIONAL  
UNION (USW), AFL-CIO, CLC,

Charging Parties.

**BRIEF IN SUPPORT OF CHARGING PARTIES' EXCEPTIONS**

Submitted by: Robert A. Hicks  
Richard J. Swanson  
Attorneys for the Charging  
Parties

MACEY SWANSON AND ALLMAN  
445 North Pennsylvania Street, Suite 401  
Indianapolis, IN 46204-1800  
P: (317) 637-2345  
F: (317) 637-2369  
[rswanson@maceylaw.com](mailto:rswanson@maceylaw.com)  
[rhicks@maceylaw.com](mailto:rhicks@maceylaw.com)

## TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE .....	1
II. QUESTIONS BEFORE THE BOARD .....	4
III. FACTUAL BACKGROUND .....	5
A. Background .....	5
B. Contract Negotiations Commence In January 2011 .....	6
C. Negotiations Continue In February 2011 And The Employer Begins Bargaining Economic Proposals .....	8
D. Contract Negotiations Continue On March 9 and 10, 2011 .....	10
E. The Parties Meet For Negotiations On March 28, 2011 And The Employer Submits Its Initial Last, Best And Final Offer .....	11
F. The Employer's Initial Last, Best And Final Offer Is Rejected By The Membership .....	12
G. The Employer And The Union Reach Several Agreements During A July 28, 2011 Negotiation Session And Make Significant Progress .....	13
H. The September 2, 2011 Negotiation Session .....	14
I. The Employer Locks Out The Bargaining Unit Employees .....	18
J. The Employer And The Union Continue To Negotiate After The Lockout .....	19
IV. ARGUMENT .....	20
A. Standard of Review .....	20
B. Exceptions To ALJ's Factual Findings .....	22
1. The ALJ Improperly Weighed The Parties' Negotiating History When Evaluating Whether The Parties Were At Impasse (Exception 7) .....	22

2.	The ALJ Improperly Weighed The Evidence Regarding The Length Of The Parties' Negotiations When Evaluating Whether The Parties Were At Impasse (Exceptions 8 and 9) .....	23
3.	The ALJ Improperly Found That There Was No Reasonable Basis For The Union To Believe That Continued Bargaining On Or After September 2 <sup>nd</sup> Would Have Been Fruitful (Exceptions 13 and 14) .....	25
4.	The ALJ Improperly Weighed The Evidence That The Pryor, Oklahoma Facility Employees Voted To Accept The Company's Last, Best and Final Offer Despite Their Union's Refusal To Accept The Proposal At The Bargaining Table (Exceptions 20 and 21) .....	26
5.	The ALJ Improperly Found That The Union's March 10, 2011 "Counterproposal" On The 401(k) Issue Was Essentially The Opposite Of The Company's Proposal (Exception 35) .....	28
6.	The ALJ Improperly Found As A Matter Of Fact That The Company Moved "Only Slightly" On The 401(k) Issue During The March 28 <sup>th</sup> Negotiation Session (Exception 36) .....	29
7.	The ALJ Erroneously Found As A Matter Of Fact That The July 28, 2011 Negotiation Session Was Only "Relatively" Productive (Exception 37) .....	30
8.	The ALJ Failed To Find That The Union's District 7 Director Jim Robinson Did Not Have A Negotiating Role During The September 2 <sup>nd</sup> Session (Exception 38) .....	31
C.	Exceptions to ALJ's Conclusions .....	31
1.	The Company Unlawfully Refused To Continue To Bargaining With The Union By Prematurely Declaring Impasse During The September 2 <sup>nd</sup> Negotiation Session (Exceptions 1-26, 28-31, 33-39) .....	31
a.	The Impasse Standard .....	32
b.	The ALJ's Conclusion That The Parties Were At Impasse Is Erroneous .....	33

2.	The Company Improperly Bargained To Impasse On A Permissive Subject Of Bargaining - The Submission Of The Company's Revised LBFO For A Ratification Vote (Exceptions 1, 2, 5-6, 10-39) .....	40
3.	The Employer's Violations Of The Act Tainted Its Lockout .....	43
IV.	CONCLUSION .....	44

## TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Allen Storage &amp; Moving Co.</i> , 342 NLRB 501 (NLRB 2004) . . . . .	43
<i>AMF Bowling Co.</i> , 314 NLRB 969 (NLRB 1994) . . . . .	32
<i>Assoc. of DC Liquor Wholesalers</i> , 292 NLRB 1234 (NLRB 1984), <i>enf'd sub. nom.</i> Teamsters Local No. 639 v. NLRB, 924 F.2d 1078 (D.C. Cir. 1991) . . . . .	43
<i>Bob Showers Windows &amp; Sunrooms, Inc.</i> , 2005 NLRB LEXIS 589 (NLRB Dec. 14, 2005) . . .	43
<i>Caldwell Mfg., Co.</i> , 346 NLRB 1159 (NLRB 2006) . . . . .	33
<i>Caravelle Boat Co.</i> , 227 NLRB 1355 (NLRB 1977) . . . . .	25
<i>Clemson Brothers, Inc.</i> , 290 NLRB 944 (NLRB 1988) . . . . .	43
<i>Cotter &amp; Co.</i> , 331 NLRB 787 (NLRB 2000) . . . . .	32
<i>Erie Brush &amp; Mfg. Corp.</i> , 357 NLRB No. 46 (NLRB 2011), 2011 NLRB LEXIS 424 (Aug. 9, 2011) . . . . .	32, 38
<i>Grinnell Fire Prot. Sys. Co.</i> , 328 NLRB 585 (NLRB 1999) . . . . .	32
<i>Gulf States Mfg., Inc. v. NLRB</i> , 704 F.2d 1390 (5th Cir. 1983) . . . . .	32
<i>Hospital Mgmt. Assoc., Inc.</i> , 284 NLRB 37 (NLRB 1987) . . . . .	21
<i>Huck Mfg.</i> , 693 F.2d 1176 (5th Cir. 1982) . . . . .	32, 37
<i>Larsdale, Inc.</i> , 310 NLRB 1317 (NLRB 1993) . . . . .	32
<i>Movers and Warehousemen's Ass'n of Metropolitan Washington, DC</i> , 224 NLRB 356 (NLRB 1976), <i>enf'd</i> 550 F.2d 962 (4th Cir. 1977) . . . . .	43, 44
<i>Patrick &amp; Co.</i> , 248 NLRB 390 (NLRB 1980), <i>enfd. mem.</i> 644 F.2d 889 (9 <sup>th</sup> Cir. 1991) . . . . .	37
<i>Permaneer Corp.</i> , 214 NLRB 367 (NLRB 1974) . . . . .	21
<i>Pratt Indus., Inc.</i> , 358 NLRB No. 52, 2012 NLRB LEXIS 322 (NLRB June 5, 2012) . . . . .	32
<i>RC Aluminum Indus., Inc.</i> , 343 NLRB 939 (NLRB 2004) . . . . .	21

<i>Royal Motor Sales</i> , 329 NLRB 760 (NLRB 1999) .....	32, 43
<i>Standard Dry Wall Products, Inc.</i> , 91 NLRB 544 (NLRB 1950), <i>enf'd</i> 188 F.2d 362 (3d. Cir. 1951) .....	20, 21
<i>Teamsters Local Union No. 639 v. NLRB</i> , 924 F.2d 1078 (D.C. Cir. 1991) .....	43
<i>Tom Ryan Distrib.</i> , 314 NLRB 600 (NLRB 1994), <i>affirming</i> 1993 NLRB LEXIS 1297 (NLRB Dec. 10, 1993) .....	25
<i>Towne Plaza Hotel</i> , 258 NLRB 69 (NLRB 1981) .....	33
<i>Vision of Elk River, Inc.</i> , 359 NLRB No. 5 (NLRB Sept. 28, 2012) .....	21

## STATUTES

## PAGE(S)

29 U.S.C. § 158, <i>et seq.</i> .....	38, 43
---------------------------------------	--------

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

NEW NGC, INC.,	)	
d/b/a NATIONAL GYPSUM COMPANY,	)	
	)	
Charged Party/Employer,	)	
	)	
and	)	Case 25-CA-031825
	)	Case 25-CA-031898
UNITED STEEL, PAPER AND FORESTRY,	)	Case 25-CA-065321
RUBBER, MANUFACTURING, ENERGY,	)	
ALLIED INDUSTRIAL AND SERVICE WORKERS	)	
INTERNATIONAL UNION, AFL-CIO and its	)	
LOCAL NO. 7-0354,	)	
	)	
Charging Parties/Union.	)	

**BRIEF IN SUPPORT OF CHARGING PARTIES' EXCEPTIONS**

Charging Parties, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union ("USW" or "International Union") and Local No. 7-0354 ("Local Union") (collectively, "Union"), submit the following brief in support of their exceptions to the Administrative Law Judge's Decision.

**I. STATEMENT OF THE CASE**

The Charged Party New NGC, Inc. (the "Company" or the "Employer") and the Union have been parties to a collective bargaining agreements for several years. Their last collective bargaining agreement expired on January 31, 2011. The parties' negotiations for a new collective bargaining agreement commenced on January 13, 2011. At that time, the Union submitted a comprehensive proposal that included both economic and non-economic items. However, the Company negotiators advised that the Company was not yet willing to negotiate economic items and was only prepared to negotiate non-economic items. Nonetheless, the

parties began negotiating and reached several tentative agreements in sessions on January 13, 24 and 25, 2011.

On January 26, 2011 a serious question arose concerning whether the Company was appropriately funding its pension program. The parties ceased negotiating until the Company supplied information to show that its pension funding was adequate. On January 31st, the collective bargaining agreement expired and the Company advised that it would no longer arbitrate grievances. This complicated negotiations further because the Union had to raise grievances in negotiations rather than through the grievance-arbitration procedure.

In spite of these issues, the parties continued to negotiate and met on February 9, 2011. At that time, the Company indicated that it would begin negotiating economic items. Its proposal included a new type of retirement account for employees under the age of forty (40) and new hires and a modification of language regarding the employees' existing 401(k) plan. These proposals represented marked changes from the status quo under which all employees were eligible for a defined benefit rather than a defined contribution retirement plan and the Company could not unilaterally suspend 401(k) contributions.

The parties continued to meet and make progress during bargaining sessions on March 9, 10 and 28, 2011. They reached a variety of tentative agreements. They also exchanged substantive proposals with respect to the 401(k) proposal and discussed the new retirement account proposal. They made this progress even though another significant issue regarding the Company's obligation to make increased health contributions also came to fruition in March. This issue also became a new issue in negotiations and was the subject of an unfair labor practice charge.

On March 28, 2011, the Company submitted its initial last, best and final offer ("LBFO") to the Union. Although the Union membership rejected this proposal in April 2011, the Employer did not consider the parties to be at impasse. The parties continued to meet in May and July, 2011. It is undisputed that both parties agreed that the July 28, 2011 session was their most productive to date as both sides made significant concessions. The parties' next bargaining session took place on September 2, 2011. In this meeting, the Union submitted a counter-proposal and the parties continued to reach understandings and move closer on other important outstanding proposals. Nonetheless, Company abruptly and for the first time in negotiations unilaterally announced that the parties were at impasse unless the Union submitted its revised LBFO which included all agreements reached through that date, to another ratification vote. The Union stood willing to bargain that day or on future dates because it did not consider the parties to be at impasse. It told the Company this on September 2<sup>nd</sup> and in subsequent e-mails. However, when the Union failed to accede to the Employer's demand to submit the LBFO for a vote, the Company locked out the bargaining unit employees.

On July 29, 2011, the Acting General Counsel issued a Complaint. The Complaint alleged that the Company violated Section 8(a)(5), (3) and (1) of the Act by prematurely declaring that the parties were at impasse when they were not at impasse and by insisting to impasse on a permissive subject of bargaining- the ratification of its contract proposal. The Acting General Counsel further alleged that, by engaging in these actions, the Company's subsequent lockout of its employees was unlawful. The Complaint also alleged that the Company violated the Act by unilaterally refusing to pay its portion of increases in health insurance premiums and by unilaterally changing its lockout/tagout procedures.

The case was heard before Administrative Law Judge (“ALJ”) Jeffrey Wedekind from May 7 to May 9, 2012 in Bloomington, Indiana. (ALJ’s Decision, p. 2, lines 22-23). The ALJ issued his decision on September 7, 2012. The ALJ concluded that the Company did violate Section 8(a)(5), (3) and (1) of the Act by unilaterally changing its lockout/tagout procedures and by refusing, from April 1 to June 30, 2011 to pay any portion of the increase in health insurance premiums. (ALJ’s Decision, p. 31). However, the ALJ found that the Company did not violate the Act by prematurely declaring impasse or by insisting to impasse on another ratification vote. (*Id.*). The decision to dismiss these allegations contains several incorrect factual findings and mistaken conclusions of law to which the Union has excepted. This brief is offered in support of these exceptions.

## **II. QUESTIONS BEFORE THE BOARD**

A. Whether the Company violated the Act by prematurely declaring impasse during the September 2, 2011 bargaining session? **(Exceptions 1-26, 28-31, 33-39)**

B. Whether the Company violated the Act by insisting, as a condition of reaching any agreement and ending the declared impasse, that the Union permit another ratification vote?  
**(Exceptions 1, 2, 5-6, 10-39)**

C. Whether the Company’s premature declaration of impasse and/or insistence to impasse on a non-mandatory subject of bargaining tainted its subsequent lockout of bargaining unit employees? **(Exceptions 1-39)**

### **III. FACTUAL BACKGROUND**

#### **A. Background**

The Employer is a manufacturer of gypsum wallboard, which is its primary product. (Tr. p. 40).<sup>1</sup> The Employer operates a manufacturing facility in Shoals, Indiana. (Tr. 342). The Shoals facility has an underground mine where gypsum is mined from rock for wallboard. (Tr. p. 342). The Employer's customers are primarily focused in the construction and remodeling business for homes and commercial properties. (Tr. p. 40).

Production, warehouse, maintenance and mine employees of the Employer's Shoals facility are represented by the Union. (Tr. p. 343, 488; G.C. Ex. 2(A)). There are approximately eighty-two (82) employees in the bargaining unit. (Tr. p. 72, 91, 286).

The Union and the Employer have been parties to collective bargaining agreements or contracts which have outlined the bargaining unit employees' terms and conditions of employment. (Tr. p. 41, 91; G.C. Ex. 2(A)).<sup>2</sup> The last collective bargaining agreement between the Employer and the Union went into effect on February 1, 2008 and expired on January 31, 2011 ("2008-2011 CBA"). (Tr. p. 41, 91, 343-344; G.C. Ex. 2(A)). The agreement was not extended by the parties after it expired. (Tr. p. 91). Prior to the expiration of the 2008-2011 CBA, the Employer and the Union each gave notice that that they wanted to open the contract for changes. (Tr. p. 41, 92; Resp. Exs. 2, 3).<sup>3</sup>

In late December 2010, the Employer's Labor Relations Manager Matthew May ("May") contacted Chris Bolte ("Bolte"), USW Staff Representative, and advised that he would be the chief negotiator/lead spokesperson for the Employer. (Tr. p. 39-40, 42-43, 89, 93). Bolte is responsible for servicing local unions of the USW, including Local 7-0354. (Tr. p. 89-90). He

---

<sup>1</sup> References to the Transcript are cited: "(Tr. p. \_\_)"

<sup>2</sup> References to the General Counsel's Exhibits are cited: "(G.C. Ex. \_\_)"

<sup>3</sup> References to the Respondent's Exhibits are cited: "(Resp. Ex \_\_)"

has held the Staff Representative position since 1992. (Tr. p. 89). Bolte has serviced Local 7-0354 since either late 2005 or 2006. (Tr. p. 90, 174). He also handled the previous set of contract negotiations between the parties. (Tr. p. 176).

**B. Contract Negotiations Commence In January 2011**

Contract negotiations began on January 13, 2011. (Tr. p. 42). The purpose of this meeting was to provide the parties an opportunity to exchange proposals and cover questions on the proposals. (Tr. p. 43). The Employer's bargaining team consisted of May, then-Plant Manager Greg Berry ("Berry"), Plant Administration/Human Resources Manager Terri Gammon ("Gammon") and Production Manager Jeff Hawk ("Hawk"). (Tr. p. 42, 94). The Union bargaining team consisted of Bolte, Local 7-0354 President Phil Hawkins ("Hawkins"), who has held this position since 2005, former Local 7-0354 Vice President Jim Floyd ("Floyd"), Steward Rob Houchin ("Houchin") and Steward Charlie Blanton ("Blanton"). (Tr. p. 43, 93-94, 285, 327).

Throughout the course of negotiations, the parties exchanged proposals. (Tr. p. 94). They also modified proposals throughout negotiations. (Tr. p. 94). They reached several tentative agreements or "TAs." (Tr. p. 94-95). When the parties reached tentative agreements, the language concerning that tentative agreement would be drafted and each would party would sign and date the language. (Tr. p. 46-47).

During the January 13<sup>th</sup> session, the Union submitted its initial proposal, which was a comprehensive proposal that addressed economic and non-economic items. (Tr. p. 43, 95; G.C. Ex. 5, p. 1-5). The Union proposal included language related to retirement benefits and pensions. (Tr. 48, 97; G.C. Ex. 5, p. 4). When negotiations commenced, the Employer was not interested in negotiating economic proposals. (Tr. p. 73). The Union requested economic

proposals from the Employer. (Tr. p. 96). However, the Employer decided that the parties should defer discussions on economic proposals until they had negotiated most of the non-economic proposals. (Tr. p. 73, 87, 96). The Employer only submitted non-economic proposals. (G.C. Ex. 5, p. 7-8).

The parties reached a tentative agreement on January 13, 2011 regarding seniority. (Tr. p. 96-98). They next met on January 24 and 25, 2011. (Tr. p. 46, 104). They exchanged proposals and counter-proposals and reached several tentative agreements on different contract provisions. (Tr. p. 46, 102, 104; G.C. Ex. 5, p. 9-28, G.C. Ex. 10, p. 1-4). They also modified other proposals. (Tr. p. 105). The Union withdrew a proposal regarding payroll after the Employer indicated during the January 24<sup>th</sup> session that its payroll department did not consider such a proposal to be feasible. (Tr. p. 103-104).

On January 25, 2011, Bolte became aware of a pension funding issue. (Tr. p. 106-107). He learned that the pension was approximately 59% funded. (Tr. p. 106). This was a problem because, under the Pension Protection Act, benefits and years of service can freeze if pension does not meet certain funding requirements. (Tr. p. 106). The regulations also limit what can be negotiated with respect to a defined benefit pension plan. (Tr. p. 106). Bolte asked May to provide answers and information regarding this issue. (Tr. p. 107).

On January 26, 2011, May did not provide answers to pension questions Bolte had asked the previous day. (Tr. p. 107). Bolte suspended negotiations until he could be sure that the Employer was complying with its pension obligations and the members were receiving their pension benefits. (Tr. p. 107). Negotiations resumed after officials from the Employer's headquarters in Charlotte and for the Union in Pittsburgh discussed the pension funding issue in a conference call. (Tr. p. 107-108, 425).

On January 31, 2011, May wrote Bolte and advised that, effective February 1, 2011, grievances presented after the expiration of the 2008-2011 CBA would not be arbitrated and would have to be handled through the negotiations. (Tr. p. 79, 113; Resp. Ex. 19). Because there was no arbitration procedure, the only avenue for dealing with grievances was through contract negotiations. (Tr. p. 79-80, 113). The parties subsequently reached tentative agreements on several grievances. (Tr. p. 80).

**C. Negotiations Continue In February 2011 And The Employer Begins Bargaining Economic Proposals**

The parties next negotiated on February 9, 2011. (Tr. p. 48, 108). They exchanged proposals and counter-proposals, offered new proposals and modified other proposals. (Tr. p. 108-110; G.C. Ex. 5, p. 29-44). They continued making progress. (Tr. p. 109). For example, the Union moved closer to the Employer's proposal concerning the expiration of an elected term of assignment for Union officials. (Tr. p. 109). They also reached a tentative agreement on vacation scheduling. (G.C. Ex. 10, p. 5).

The Employer began negotiating economic proposals at this session. (Tr. p. 48, 109). It made several proposals regarding retirement benefits. (Tr. p. 48, 110). The Employer gave a presentation regarding its new retirement account proposal. (Tr. p. 48; G.C. Ex. 5, p. 40-43). Under the terms of the 2008-2011 CBA, employees were entitled to defined benefit pension benefits that were determined by a formula based on the employee's service and a negotiated dollar multiplier. (Tr. p. 44, 99; G.C. Ex. 2(A) p. 17-18). The formula and the employee's years of service would translate into a monthly pension benefit. (Tr. p. 44, 100). In its initial proposal, the Union had proposed that the defined benefit contribution multiplier be increased \$1.00 annually for all employees for each year of the proposed three-year contract. (G.C. Ex. 5, p. 4). For those employees older than forty (40) on January 1, 2012, the Employer proposed that the

defined benefit plan continue and that the pension multiplier be increased by \$.22 in the first year of the proposed contract, \$.25 in the second year and \$.27 in the third year of the contract. (G.C. Ex. 5, p. 36).

The Employer proposed that employees under the age of forty (40) as of January 1, 2012 and new hires participate in a “new retirement account” program that was a defined contribution program. (Tr. p. 44, 100; G.C. Ex. 5, p. 38, 40-43). The new retirement account proposal constituted a shift from a defined benefit plan to a defined contribution plan. (Tr. p. 44; G.C. Ex. 5, p. 38, 40-43). In contrast to a defined benefit plan, which guarantees a monthly benefit, a defined contribution plan only guarantees a contribution by the Employer. (Tr. p. 44-45, 100; G.C. Ex. 5, p. 38, 40-43). The Employer would contribute an annual deposit into the employee’s pension account. (Tr. 45, 100; G.C. Ex. 5, p. 38, 40-43). The contribution would go into an investment vehicle like a 401(k) plan. (Tr. 45, 100; G.C. Ex. 5, p. 38, 40-43). The account would be managed by the employee. (Tr. p. 45; G.C. Ex. 5, p. 38, 40-43). Employees would not receive guaranteed investment returns. (Tr. p. 101; G.C. Ex. 5, p. 38, 40-43).

Bargaining unit employees were also entitled to participate in a 401(k) plan. The Employer proposed contract language that would allow it to make an annual contribution match to the 401(k) plan instead of a weekly contribution. (Tr. p. 51; G.C. Ex. 5, p. 39). The Employer also proposed contract language that would allow it to unilaterally suspend its 401(k) matching contribution. (Tr. p. 51; G.C. Ex. 5, p. 39).

The parties met again on February 10, 2011. (Tr. p. 51, 111). This bargaining session only lasted two (2) to three (3) hours. (Tr. p. 52). During this session, the Union submitted a detailed information request regarding the Employer’s economic proposals. (Tr. p. 111; Resp.

Ex. 24). The Employer subsequently provided a response to the Union's information request. (Tr. 52; Resp. Exs. 29, 30).

**D. Contract Negotiations Continue On March 9 and 10, 2011**

The parties negotiated again on March 9 and 10, 2011. (Tr. p. 52, 111, 114). New proposals were offered and proposals were withdrawn or modified. (Tr. p. 52-53, 111-112; G.C. Ex. 5, p. 45-60). The Union withdrew a proposal on the 401(k) plan. (Tr. p. 111).

During the March 9<sup>th</sup> session, the parties negotiated for approximately forty (40) minutes. (Tr. p. 113). May had questions about the Union's proposal and needed to talk to Employer officials in Charlotte. (Tr. p. 113). The parties caucused, and three (3) hours later, May advised that he could not get a hold of the officials in Charlotte. (Tr. p. 113). Retirement benefits were not discussed during this session. (Tr. p. 114).

The parties met again and made progress on March 10<sup>th</sup>. (Tr. p. 113-114; G.C. Ex. 5, p. 49-60). The Employer withdrew an economic proposal relating to holiday pay. (Tr. p. 114; G.C. Ex. 5, p. 49). The Union made a contingent proposal to withdraw certain proposals if the Employer withdrew some of its own proposals. (Tr. p. 116; G.C. Ex. 5, p. 51). The parties moved closer on the defined pension benefit multiplier. (Tr. p. 116-117; G.C. Ex. 5, p. 46, 56, 58).

The Union proposed new language regarding the 401(k) match proposal that the Employer had previously offered. (Tr. p. 117; G.C. Ex. 5, p. 59). The Union sought bargaining in good faith and mutual agreement in connection with a potential suspension of the 401(k) match. (Tr. p. 118). The parties also reached a tentative agreement regarding the bereavement clause of the contract and agreed to mutually withdraw their respective drug policy proposals.

(Tr. p. 54; G.C. Ex. 10, p. 6). The parties also withdrew their proposals regarding the drug policy.

**E. The Parties Meet For Negotiations On March 28, 2011 And The Employer Submits Its Initial Last, Best And Final Offer**

On March 28, 2011, the parties again met for negotiations. (Tr. p. 59, 125). Proposals were exchanged during this session. (Tr. p. 125; G.C. Ex. 5, p. 61-82). The parties made progress. (Tr. p. 125-126). The Employer modified its proposal concerning the 401(k) match by proposing language that would obligate it to meet with the Union and provide information and explain its need to suspend the match. (Tr. p. 126; G.C. Ex. 5, p. 61). The Employer's proposal would also obligate it to tell the Union when the suspension would end. (Tr. p. 126; G.C. Ex. 5, p. 61). It also changed the period of time it would give prior notice to the Union of a match suspension from ten (10) days to thirty (30) days. (G.C. Ex. 5, p. 61).

The parties moved closer to reaching agreement on the pension multiplier. (Tr. p. 126; G.C. Ex. 5, p. 61-81). The Employer modified a proposal regarding employee contributions to the health insurance plan. (Tr. p. 126). The parties reached tentative agreements regarding certain outstanding contract grievances. (Tr. p. 126; G.C. Ex. 10, p. 7-8). The Employer moved on its wage proposal. (Tr. p. 127-128; G.C. Ex. 5, p. 50, 56, 62, 68, 81). The Union made a contingent proposal to withdraw certain proposals in exchange for the Employer removing certain proposals. (Tr. p. 128).

The parties were very close to resolving issues relating to health insurance. (Tr. p. 426-427). They had agreed on the contract language, the actual insurance rates and the appropriate structure for increases. (Tr. p. 426-427; G.C. Ex. 5, p. 46-47, 49, 55, 61, 64-65).

On March 28, 2011, the Employer submitted the first version of its last, best and final offer. (Tr. p. 59; Resp. Ex. 61; G.C. Ex. 5, p. 79-81). This offer included the tentative

agreements the parties had reached to that date. (G.C. Ex. 5, p. 79-81). Prior to submitting its offer, May asked Bolte if the Union would recommend the offer for ratification. (Tr. p. 130-131). Bolte said that the Union would not recommend the proposal. (Tr. p. 131). The Union did agree to submit the offer to its membership for a vote after it received concessions on other proposals. (Tr. p. 131-132). At the end of the March 28<sup>th</sup> negotiation session, the Employer did not consider the parties to be at impasse even though the Union had rejected the Employer's offer. (Tr. p. 463).

**F. The Employer's Initial Last, Best And Final Offer Is Rejected By The Membership**

The Union submitted the Employer's March 28, 2011 last, best and final offer for a ratification vote. (Tr. p. 60, 131-132). The Local 7-0354 membership voted on the Employer's March 28, 2011 proposal. (Tr. p. 60, 132, 296). The proposal was rejected. (*Id.*). Local President Hawkins spoke with Plant Manager Berry and advised Berry that the contract had been rejected. (Tr. p. 296-297). Berry asked whether the Union planned on striking since the proposal was rejected. (Tr. p. 297). Hawkins advised that the Union had no intention of striking. (Tr. p. 297).

After the Employer's March 28, 2011 proposal was rejected, the parties met on May 10, 2011 to continue negotiations. (Tr. p. 60, 132, 464). During this session, the parties used Federal Mediator Don Ellenberger for the first time. (Tr. p. 60, 132-133). The parties did not exchange proposals during this session; however, they still made progress. (Tr. p. 133). They discussed various issues that day and attempted to prioritize proposals. (Tr. p. 133).

At this session, the Union indicated that it could potentially accept the Employer's new retirement account proposal if the plan that provided an investment return of approximately four (4) to five (5) percent per year. (Tr. p. 61, 134). May had previously given Bolte documents which indicated that returns might be seven and a half (7.5) or eight (8) percent a year. (Tr. p.

134-135). Bolte had advised that the Union could get its arms around the Employer's defined contribution proposal at those rates of return. (Tr. p. 134-135).

During this meeting, May advised that the Union had given him food for thought. (Tr. p. 134). May explained that the Employer was in a bind and it could not sweeten its deal because it had already made its last, best and final offer. (Tr. p. 62). May advised that he needed to talk to officials in Charlotte in connection with the parties' discussions. (Tr. p. 134). After the May 10<sup>th</sup> session, the Employer did not consider the parties to be at impasse. (Tr. p. 464).

**G. The Employer And The Union Reach Several Agreements During A July 28, 2011 Negotiation Session And Make Significant Progress**

The parties next met for negotiations on July 28, 2011. (Tr. p. 63, 140). May described this day as the "most constructive negotiation session since the beginning of negotiations." (Tr. p. 63, 401, 450). The parties resolved several outstanding grievances. (Tr. p. 64). The Union withdrew several of its proposals, including proposals on holiday and vacation. (Tr. p. 64, 140-141; G.C. Ex. 5, p. 83, 89). The Union also withdrew a proposal regarding dues deduction. (Tr. p. 64, 144). The Union moved away from seeking retroactive pay and proposed a signing bonus instead. (Tr. p. 64; G.C. Ex. 5, p. 91). May described these as "significant" moves on the Union's part. (Tr. p. 64-65, 451).

The Employer also made a significant move on the scheduling issue. (Tr. p. 452; G.C. Ex. 5, p. 87). The Employer had been firm in its position on this proposal since the January 13<sup>th</sup> session. (Tr. p. 452). The Employer wanted to keep the "progress going." (Tr. p. 401).

The parties reached several tentative agreements during the July 28<sup>th</sup> session. (Tr. p. 75; G.C. Ex. 10, p. 9-10). The Union accepted a proposal that was in its previous last, best and final offer regarding Article 16, Section 106. (Tr. p. 139; G.C. Ex. 5, p. 83). The Union made a proposal on health insurance. (Tr. p. 140; G.C. Ex. 5, p. 83). The Union indicated it would accept

the Employer's proposal, provided that the Employer pay the USW Health and Welfare Fund the back amount owed. (G.C. Ex. 5, p. 83). The Employer made a counter-proposal regarding a signing bonus. (Tr. p. 145). The parties did not discuss retirement benefits in any detail. (Tr. p. 145; G.C. Ex. 5, p. 93). They did, however, each move closer on the defined benefit pension multiplier. (Tr. p. 145).

May thought there was a "good dialogue, good back and forth" during the July 28<sup>th</sup> meeting and thought that bargaining went so well that he wanted to continue bargaining. (Tr. p. 401, 450). May called Bolte and told him that the July 28<sup>th</sup> session was the best session the parties had engaged in since the beginning of negotiations and expressed regret that the parties could not continue negotiating. (Tr. p. 453). May talked about setting up additional bargaining dates in August. (Tr. p. 453). The parties even began looking at weekends for negotiations, which neither party had previously considered. (Tr. p. 453-454). The parties agreed to meet again on September 2, 2011. (Tr. p. 65, 145).

#### **H. The September 2, 2011 Negotiation Session**

The parties next met for negotiations on September 2, 2011. (Tr. p. 65, 145). Jim Robinson, the Director for District 7 of the USW, attended the meeting on the Union's behalf. (Tr. p. 65, 75, 146, 333, 335). This was the first session Robinson attended. (Tr. p. 65). At the time of this session, the Shoals employees were on layoff. (Tr. p. 65).

Local 7-0354 is part of District 7, which includes Illinois and Indiana. (Tr. p. 146, 333, 334). Robinson attended the negotiation session to demonstrate to the Employer that the International Union and District 7 supported Local 7-0354 in its ongoing contract negotiations. (Tr. p. 146, 335). He wanted to make a strong statement to the Employer that the International Union took the contract issues seriously. (Tr. p. 335-336). Bolte continued to be the lead

negotiator and chief spokesperson for the Union. (Tr. p. 75, 336). Robinson did not hold himself out as a negotiator. (Tr. p. 336). He did not draft any proposals in connection with the meeting. (Tr. p. 336).

Bolte never stated that he would not continue to be the lead negotiator at any point in negotiations. (Tr. p. 166). He also never said that Robinson was switching places as lead negotiator. (Tr. p. 282-283). Robinson never indicated that he was there to negotiate for the Union. (Tr. p. 75, 166). Bolte explained that Robinson was there to “rah-rah” and to pump up the Local Union and reassure it that the International and the District were supportive. (Tr. p. 264-265). Robinson had not investigated contract proposals and was not trying to come up with different ones. (Tr. p. 264).

Bolte started the meeting by introducing Robinson to the Employer’s officials and the mediator. (Tr. p. 146). Robinson expressed that the USW and District 7 supported the Local 7-0354 employees. (Tr. p. 147, 337). His message was about the attack on retirement security and the undermining of the retirement system in our society. (Tr. p. 336). Robinson made general comments about the Employer’s retirement benefit proposals and offered his opinion of the impact that such proposals have on the middle class. (Tr. p. 147). He stated his opinion that these types of proposals were destroying the middle class. (Tr. p. 336). May responded that that was Robinson’s opinion. (Tr. p. 147).

Robinson, who has had extensive experience in collective bargaining in various capacities since the 1970s, testified that statements like the ones he made are not uncommon in negotiations. (Tr. p. 333-334, 337). He explained that it is typical in negotiations for parties on both sides to make strong statements about the importance of certain issues. (Tr. p. 337). He finds this to be helpful in bargaining because it helps to resolve conflicts. (Tr. p. 338). In his

experience, the type of comments he made do not preclude parties from reaching agreements. (Tr. p. 338).

The parties next began discussing a local newspaper article that indicated the Shoals employees would not return to work until an agreement was reached. (Tr. p. 148, 336-337). Robinson asked May if that article was true and the employees would not be returning to work. (Tr. p. 148, 301, 336-337). Robinson and Bolte told May the Union wanted to know if the employees were going back to work on September 6, 2011. (Tr. p. 148-149). The parties caucused and May then advised that the laid off employees would return to work on September 6, 2011. (Tr. p. 148-149). Robinson did not make any additional comments as his purpose was accomplished. (Tr. p. 149-150, 337).

The Union then submitted a counter-proposal to the Employer. (Tr. p. 150; G.C. Ex. 5, p. 95-97). Robinson left the meeting after the Union offered the counter-proposal and the parties caucused. (Tr. p. 149-150, 259, 338). The parties were still negotiating when he left. (Tr. p. 338). He did not get involved in the counter-proposal or the negotiations because that was not his role; however, he assumed there would be a full day of negotiations left. (Tr. p. 338). No one suggested that the parties could not continue negotiating. (Tr. 339).

The Union's counter-proposal reflected movement by the Union on various outstanding proposals. (Tr. p. 150-152, G.C. Ex. 5, p. 95-97). The parties moved much closer to agreement on the defined benefit pension multiplier as the Union again reduced its proposal to \$.49 in year one, \$.62 in year two and \$.77 in year three. (G.C. Ex. 5, p. 96). In its counter-proposal, the Union also reached the exact same wage increase proposed by the Employer. (Tr. p. 78; G.C. Ex. 5, p. 96).

The Union added a proposal that there be no balance billing for the money the employees still owed for health insurance premiums back to April 1, 2011. (Tr. p. 150; G.C. Ex. 5, p. 95). The parties reached three (3) or four (4) tentative agreements. (Tr. p. 152; G.C. Ex. 10, p. 11).

Upon the return from caucus, May said that the Employer had a revised last, best and final offer that would include all tentative agreements reached through that date. (Tr. p. 153). For the first time in negotiations, the Employer raised the possibility of a bargaining impasse. (Tr. p. 66-67). May stated that, short of the Union taking the Employer's September 2<sup>nd</sup> proposal back for a vote, the parties were at impasse. (Tr. p. 77, 153, 260, 299).

In all of his years of experience, Bolte had never heard this analysis of impasse. (Tr. p. 153). Bolte asked for a copy of the Employer's last, best and final offer. (Tr. p. 153). May advised that the Employer was putting the proposal together. (Tr. p. 153). Bolte asked May to clarify his position. (Tr. p. 154). Bolte said: "[I]s your position if we vote on the last, best and final offer then we're not at impasse? But if we don't vote on this last, best and final offer then we are at impasse?" (Tr. p. 154, 299-300). May responded: "That's our position." (Tr. p. 154, 300). May confirmed that the impasse was based on the last, best and final offer going to a vote or not going to a vote. (Tr. p. 154). Bolte told the Union bargaining committee to write down everything that was said because the Employer was not going to dictate when the employees would vote. (Tr. p. 154).

Bolte told May that the parties were not at impasse. (Tr. p. 154-155, 261, 300). Bolte did not believe the parties were at impasse because they had continued reaching tentative agreements. (Tr. p. 156).

Bolte said that the parties needed to bargain longer. (Tr. p. 154, 261, 300). He also remarked that the parties had made progress in negotiations. (Tr. p. 154). May replied that the

Employer was not bargaining longer that day. (Tr. p. 155). Bolte requested additional dates in September. (Tr. p. 155). May said: "We're not doing that. I'm not giving you any dates." (Tr. p. 155, 300). The Union was prepared to continue bargaining September 2nd or in the future. (Tr. p. 155).

#### **I. The Employer Locks Out The Bargaining Unit Employees**

On September 4, 2011, Bolte wrote May an e-mail regarding the negotiations. (Tr. p. 157; Resp. Ex. 44) which stated:

The Union remained willing to meet all Friday, September 2, 2011 and I indicated I could offer other dates for future negotiations. On behalf of the Employer, you refused any further bargaining on September 2, 2011 and indicated that the Employer was not interested in any future dates. I stated during our September 2, 2011 meeting and I am again stating for the record that it remains the Union's position that the parties are not at impasse regardless of whether or not the Union takes the Employer's proposal back to the membership for a vote. As I indicated, the Union remains willing to continue bargaining.

(Resp. Ex. 44).

On September 6, 2011, the Employer locked out the bargaining unit employees at approximately 5:00 a.m. (Tr. p. 69, 301). The employees were provided with a notice saying that they were locked out and that they would remain locked out until a new collective bargaining agreement was ratified. (Tr. p. 302; Respondent's Ex. 87). The notice also advised that the Employer believed the lockout was necessary to bring the negotiations to a conclusion with a new agreement. (Tr. p. 302; Resp. Ex. 87).

May responded to Bolte's e-mail on September 6, 2011 and advised that the Employer did not intend to modify its proposal regarding the defined benefit pension multiplier, the new retirement account or the 401(K) plan. (Respondent's Ex. 44). May advised that it considered

these issues “critical” to the reaching of a new agreement. (*Id.*). The Employer had never previously identified any issues as critical. (*Id.*; Tr. p. 157-158).

Before September 6, 2011, the Union had never indicated that it was going to strike. (Tr. p. 158). Before September 6, 2011, the subject of a lockout by the Employer had not come up. (Tr. p. 159). The Employer did not implement the terms of its last, best and final offer. (Tr. p. 243-244).

#### **J. The Employer And The Union Continue To Negotiate After The Lockout**

The parties met for another negotiation session on October 24, 2011. (Tr. p. 70, 159). The Union presented a new counter-proposal. (Tr. p. 159; G.C. Ex. 5, p. 103-105). The parties made additional progress. (Tr. p. 159-160). During this session, the parties reached a tentative agreement on Article 4, Section 14 of the contract, which related to employee leave. (Tr. p. 160). The Union made a counter-proposal on the 401(k) match suspension, suggesting the addition of a sentence to the last Employer proposal on the 401(k) suspension that required bargaining in good faith. (Tr. p. 160; G.C. Ex. 5, p. 103). The Union reduced its signing bonus proposal. (Tr. p. 161; G.C. Ex. 5, p. 105).

The Union also presented a new proposal regarding the new retirement account. (Tr. p. 71, 161-163). The Union advised that it would accept the Employer’s proposal for a defined contribution plan for employees under the age of forty (40) if the plan was the USW-sponsored 401(k) savings plan. (Tr. p. 71-72, 161-163). Bolte advised that he could provide additional information if the Employer had questions on this proposal. (Tr. p. 72). Bolte also stated that he would look for other options that might be agreeable to the parties. (Tr. p. 72).

Bolte had researched plans for months. (Tr. p. 165). This was a difficult endeavor because, in Bolte’s view, that the Employer sought a plan that: 1) would only let certain

employees in; 2) would not let employees borrow; and 3) would only allow for an Employer contribution and not an employee contribution. (Tr. p. 247, 270). Bolte had researched a USW-sponsored retirement account proposal. (Tr. p. 164). He found a plan that, though it did not guarantee a return, had a ten-year steady return of 3.91%. (Tr. p. 164, 270). Bolte advised the Union negotiating committee that this plan was as good as Bolte could find. (Tr. p. 165). This plan was essentially what the Employer was proposing because it could be offered to those employees less than forty (40) years of age. (Tr. p. 165). There was also no borrowing associated with the plan, which was an Employer requirement. (Tr. p. 165-166).

The Employer's negotiators asked for additional information about the Union's proposal and the Union provided that information. (Tr. p. 71-72). May testified that he wanted to get a chance to completely understand what Bolte was proposing. (Tr. p. 76). Bolte was even thinking about having an outside official come in to discuss the plan in greater detail. (Tr. p. 163).

#### IV. ARGUMENT

##### A. Standard of Review

Many years ago, the Board set forth the standard of review of an administrative law judge's findings of fact in *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (NLRB 1950), *enf'd* 188 F.2d 362 (3d Cir. 1951). In *Standard Dry Wall*, the Board stated:

In all cases, save only where there are no exceptions to the Trial Examiner's proposed report and recommended order, the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence. Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings.

*Id.* at 544-545. The Board continues to utilize this standard today. For example, in *RC Aluminum Indus., Inc.*, 343 NLRB 939 (NLRB 2004), the Board observed that it has the power and responsibility of determining the facts as revealed by the preponderance of the evidence, and that it is not bound by the judge's findings of facts, but bases its findings on a *de novo* review of the entire record.

In contrast, when the demeanor of witnesses is a factor of consequence in resolving issues of credibility, it is the Board's policy to attach great weight to the administrative law judge's credibility findings insofar as they are based on demeanor. *Standard Dry Wall*, 91 NLRB at 545. The Board will not overrule resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces the Board that the administrative law judge's resolution was incorrect. *Id.* See also, *Vision of Elk River, Inc.*, 359 NLRB No. 5 fn. 1 (NLRB Sept. 28, 2012) ("The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect."). However, an administrative law judge cannot simply ignore relevant evidence bearing on credibility and expect the Board to "rubber stamp" his or her resolutions by uttering the magic word "demeanor." *Permaneer Corp.*, 214 NLRB 367, 369 (NLRB 1974).

The Board's review of the ALJ's legal conclusions is *de novo*. See, e.g., *Hospital Mgmt. Assoc., Inc.*, 284 NLRB 37, 37 (NLRB 1987) ("Where the judge has failed to perceive and resolve...the factual and legal issues before him, the Board is certainly free to review the record *de novo*.").

## **B. Exceptions To ALJ's Factual Findings**

The Union excepts to several of the specific factual findings in the ALJ's decision, as well as, the weight given to certain of the ALJ's fact findings.

### **1. The ALJ Improperly Weighed The Parties' Negotiating History When Evaluating Whether The Parties Were At Impasse (Exception 7)**

When evaluating whether the parties were at impasse, the ALJ found that the parties have a "history of successfully and expeditiously negotiating successive agreements, apparently without the necessity of economic warfare." (ALJ's Decision, p. 27, lines 5-7). The implication in this finding is that the parties' previous negotiations indicate that they were at impasse in these negotiations because these negotiations were longer and not successfully resolved. The ALJ ignored ample record evidence which establishes that these negotiations were unique for several reasons and therefore not analogous to previous negotiations.

For example, in the 2011 negotiations, the Company sought significant changes to the retirement benefits it offers to the bargaining unit employees. (Tr. p. 345-348). In fact, the Company had decided that it would seek these significant changes well before the Shoals negotiations commenced. (*Id.*). The Company had already negotiated these changes in collective bargaining agreements at other facilities. (*Id.*). The combination of the significance of the changes coupled with the Company's intent on obtaining these concessions prior to negotiations led to a negotiating environment that had not previously existed.

These negotiations were also complicated by several issues that arose after the commencement of the negotiations including: 1) a pension funding issue; 2) a health insurance funding issue; 3) the suspension of the grievance/arbitration procedure (which led to the Union pursuing grievances through negotiations as its only means of resolution); and 4) several unfair

labor practices that led to Board charges. (Tr. p. 54-56, 59, 79-80, 107-108, 113, 118, 121-125, 425, 428-429, 548; Resp. Ex. 113).

The ALJ even observed in his own factual findings that “circumstances in 2011 were significantly different.” (ALJ’s Decision, p. 15, line 5). For one, the ALJ noted that the Company’s business had soured along with the economy, resulting in reduced work schedules and several plant closures. (*Id.* at lines 5-6). The ALJ also found that the Company had proposed “substantial modifications” to the existing pension and 401(k) plans, but still compared these negotiations to prior negotiations at Shoals in which these issues were not raised. (*Id.* at lines 6-7). When this evidence is properly weighed, the vast amount of record evidence demonstrates that the parties’ previous negotiations are irrelevant to the determination of whether the parties were at impasse in these negotiations because those negotiations were not substantially similar to these negotiations.

**2. The ALJ Improperly Weighed The Evidence Regarding The Length Of The Parties’ Negotiations When Evaluating Whether The Parties Were At Impasse (Exceptions 8 and 9)**

The ALJ found that the parties met on twelve (12) separate occasions. (ALJ’s Decision, p. 27, Lines 9-10, Footnote 29). The ALJ further found that half of the parties’ meetings lasted all or most of the day. (*Id.*). By focusing on these facts and ignoring others, including some of his own fact findings, the ALJ ascribed improper significance to the number of the parties’ negotiation sessions and the duration of these sessions.

Although negotiations commenced in January 2011, it is undisputed that the Company would not negotiate any economic items prior to the February 9, 2011 bargaining session. (Tr. p. 43, 48, 73, 87, 95-96, 109). The items on which the ALJ found the parties were deadlocked- the new retirement account proposal and the 401(k) match proposal- are economic items. Although

the ALJ's finding that the parties met on twelve (12) separate occasions over nine (9) months is technically true, it is not a proper measure of the parties' bargaining sessions in relation to the impasse analysis. As the ALJ recognizes in a footnote in his decision, only seven (7) bargaining sessions took place after the February 9<sup>th</sup> meeting. (ALJ's Decision, p. 27, Lines 9-10, Footnote 29). The ALJ also recognizes that only three (3) of the meetings that took place after February 9, 2011 were full-day meetings. (*Id.*). Thus, with respect to the issues that the ALJ found the parties to be deadlocked (and thus at impasse) the parties only met seven (7) times with only three (3) of these sessions being full-day sessions.

Furthermore, several of the limited number sessions the parties had after the Company started negotiating economic proposals were truncated and extremely short for various reasons. For example, as the ALJ found, the parties did not exchange any proposals or counter-proposals during the February 10<sup>th</sup> session because the Union submitted an extensive information request regarding the Company's retirement proposals. (ALJ's Decision, p. 17, lines 37-40; Tr. p. 51-52, 111). The Union needed this information to bargain these proposals. (Tr. p. 51-52, 111; Respondent's Ex. 24). As the ALJ also observed, even though the parties made progress during the March 9<sup>th</sup> bargaining session, the session only lasted less than an hour. (ALJ's Decision, p. 18, lines 7-10; Tr. p. 113-114, 150-153; G.C. Ex. 5, p. 95-97). Finally, the Company cut off negotiations on September 2<sup>nd</sup> after the parties had just commenced bargaining. (Tr. p. 73, 77, 154-155, 259-260, 299-300).

Although the Union submitted a counter-proposal and the parties had reached a tentative agreement during that session, the Company declared that the parties were at impasse unless the Union submitted its latest LBFO for a second ratification vote. (Tr. p. 153-154, 299-300). The parties therefore only had three (3) full days of bargaining after the February 9<sup>th</sup> session along

with several truncated sessions. *Caravelle Boat Co.*, 227 NLRB 1355, 1358-1359 (NLRB 1977) (finding of no impasse where parties met on fourteen (14) occasions). *See also*, *Tom Ryan Distrib.*, 314 NLRB 600 (NLRB 1994), *affirming* 1993 NLRB LEXIS 1297 (NLRB Dec. 10, 1993) (no impasse where parties had only met eight (8) times before employer unilaterally declared impasse).<sup>4</sup>

**3. The ALJ Improperly Found That There Was No Reasonable Basis For The Union To Believe That Continued Bargaining On Or After September 2<sup>nd</sup> Would Have Been Fruitful (Exceptions 13 and 14)**

The ALJ's fact finding that there was no reasonable basis for the Union to believe that continued bargaining on or after September 2<sup>nd</sup> would have been fruitful is not supported by the record evidence. The record evidence establishes that the Union was justified in believing that the parties were never at impasse due to the consistent progress the parties made throughout the negotiations and the remaining room the Union had to move with respect to all issues. Through the September 2<sup>nd</sup> session, the parties reached numerous tentative agreements on a variety of different contract provisions. (G.C. Ex. 10). They ultimately met each other over a wage increase. (Tr. p. 78; G.C. Ex. 5, p. 96). In addition, they were moving closer with respect to the defined benefit pension multiplier, which was also identified by the Employer as a critical issue after the Employer cut off bargaining during the September 2<sup>nd</sup> session. (Tr. p. 150-152, G.C. Ex. 5, p. 95-97).

Even after the Employer submitted its initial last, best and final offer on March 28, 2011 and that proposal was rejected in April 2011, the parties continued negotiating and making progress. In fact, the Employer's lead negotiator recognized that the parties had their "most

---

<sup>4</sup> To the extent that the pre-February 9<sup>th</sup> sessions in which the Company refused to bargain economic items are considered, the record is clear that the parties still did not engage in extensive bargaining. The initial January 13, 2011 session lasted about two (2) hours. (ALJ's Decision p. 15, line 15). Although the parties met for full days of bargaining on January 24 and 25, 2011, the January 26<sup>th</sup> session lasted only fifteen (15) minutes because the pension funding issue arose. (ALJ's Decision, p. 16, lines 8-9, 27-30, 39-40).

constructive” negotiation session on July 28<sup>th</sup>. (Tr. p. 63, 401, 450). Even during the September 2<sup>nd</sup> session, when the Employer unilaterally declared impasse, the parties continued reaching tentative agreements. (Tr. p. 152). In fact, one of the Employer’s negotiators noted in his negotiation minutes that the agreement showed the parties were making progress at that time. (Resp. Ex. 132).

The parties’ progress is even more significant given that several issues arose during the negotiations that sidetracked or added to the negotiations, including: 1) the pension funding issue; 2) the Employer’s refusal to negotiate economic proposals before February 9, 2011; 3) the Employer’s refusal to comply with the grievance/arbitration procedure after the January 31, 2011 expiration of the 2008-2011 CBA, which led to grievances having to be resolved in negotiations and 4) the Employer’s refusal to pay health insurance premium increases for several months, which created another serious issue for the parties to address in negotiations. (Tr. p. 48, 54-56, 59, 79-80, 107-109, 113, 118, 121-125, 425, 428-429, 516, 548; Respondent’s Ex. 113).

**4. The ALJ Improperly Weighed The Evidence That The Pryor, Oklahoma Facility Employees Voted To Accept The Company’s Last, Best and Final Offer Despite Their Union’s Refusal To Accept The Proposal At The Bargaining Table (Exceptions 20 and 21)**

The ALJ credited May’s testimony that he believed negotiations between the Union and the Company could have been wrapped up with just one (1) more day of bargaining on March 28, 2011, because of the “history of employees voting to accept the Company’s LBFO despite the Union’s refusal to agree to it at the table.” (ALJ’s Decision, p. 29, lines 9-12). The “history” to which the ALJ was referring relates to the bargaining negotiations between the Company and the International Union at the Company’s Pryor, Oklahoma facility. May was the lead negotiator at this facility and he testified that the employees accepted the Company’s LBFO after the Union refused to agree to the Company’s proposal at the bargaining table. (Tr. p. 342, 350, 390). The

ALJ relied on this “history” as a justification for the Company’s continued push for a second ratification vote during the September 2<sup>nd</sup> session after the Union overwhelmingly voted to reject the Company’s original LBFO on April 9, 2011. (ALJ’s Decision, p. 29, lines 17-21). The ALJ found that it also explained why the Company would believe, as May testified, that a re-vote at that time would break the deadlock and result in a contract. (*Id.*).

The ALJ improperly weighed this so-called “history” in evaluating whether the parties were at impasse. The record is devoid of evidence that there was any history between the Company and the Union at the Shoals facility that would support the ALJ’s conclusions. Prior to these negotiations, neither May nor the Union’s lead negotiator Bolte had ever negotiated at the Shoals facility. (Tr. p. 90-91, 174, 343-345). In fact, May had relatively little experience in collective bargaining negotiations. (Tr. p. 343-345). Although the employees at the Pryor, Oklahoma facility are represented by the International Union, these employees have their own Local Union. In fact, May acknowledged that no representative of the International Union even attended the Pryor negotiations. (Tr. p. 462). There is no record evidence that the Pryor, Oklahoma local has anything in common with the Shoals Local Union with respect to negotiations. There also is no evidence that the employees at the Pryor, Oklahoma facility ratified the contract after initially voting to reject the contract. The bargaining history at the Shoals, Indiana and Pryor, Oklahoma facilities is clearly not analogous. The Pryor negotiations therefore could not reasonably have been a factor in the Company’s push for a second ratification vote at the Shoals facility or considered support for the Company’s alleged belief that a second vote would break the impasse.

Additionally, the bulk of the record evidence establishes that May could not have reasonably believed that insisting on a re-vote on September 2<sup>nd</sup> would result in contract

ratification. The Union members had overwhelmingly rejected the previous LBFO by a margin of 65-3. (Tr. p. 132, 243, 296). There were still multiple matters upon which the Union and the Company had not agreed on September 2<sup>nd</sup>. The Union had previously recommended that the bargaining unit employees reject the Company's initial LBFO and Union negotiators wanted to continue negotiating on September 2<sup>nd</sup>. (Tr. p. 153-154, 261, 300, 450-453). Its lead negotiator continued to implore the Company to continue negotiating in e-mail correspondence after September 2<sup>nd</sup> and prior to the September 6<sup>th</sup> lockout. (Tr. p. 153-154, 157, 261, 300; Resp. Exhibit 44). The record, thus, does not support a finding that the Company's insistence on a ratification vote during the September 2<sup>nd</sup> session would have led to a ratification of the contract.

**5. The ALJ Improperly Found That The Union's March 10, 2011 "Counterproposal" On The 401(k) Issue Was Essentially The Opposite Of The Company's Proposal (Exception 35)**

The ALJ diminished the significance of the Union's March 10, 2011 counterproposal on the 401(k) issue. The Union proposal would have allowed the Company to suspend its matching 401(k) contribution, which is exactly what the Company was seeking. (Tr. p. 117-118; G.C. Ex. 5, p. 59). In contrast to the Company's proposal, the Union proposal ceded this right to the Company after the parties bargained in good faith and reached mutual agreement on this issue. (Tr. p. 118). The ALJ found that this was essentially the opposite of what the Company was offering and referred to the Union's offer as a "counter-proposal," suggesting that it was a hollow offer. (ALJ's Decision, p. 18, lines 37-46). Yet, the Union's offer represented a marked change from the status quo. Under the previous arrangement, the Company had no right to suspend its 401(k) match and the parties were not even required to discuss mid-contract changes to the Company's 401(k) match obligation. The Union's offer represented real progress in negotiations. It constituted a movement toward the Company's proposal and offered the

Company a right that it did not previously possess. Contrary to the ALJ's fact findings, the Union's proposal was undoubtedly a real one and not simply the "opposite" of what the Company offered. Since the Company changed its 401(k) proposal in the next negotiation session, it is also fair to infer the Union's proposal was a meaningful one.

**6. The ALJ Improperly Found As A Matter Of Fact That The Company Moved "Only Slightly" On The 401(k) Issue During The March 28<sup>th</sup> Negotiation Session (Exception 36)**

The ALJ also diminished the significance of the Company's subsequent modification of its 401(k) proposal. The ALJ specifically determined that the Company's March 28, 2011 proposal represented only slight movement on this issue. (ALJ's Decision, p. 19, lines 38-42). In fact, the Company's movement was also significant. The Company proposed language that would obligate it to not only meet with the Union but also provide information and explain its need to suspend the 401(k) match. (Tr. p. 126; G.C. Ex. 5, p. 61). This proposal also obligated the Company to tell the Union when the suspension would end and changed the period of time it would give prior notice to the Union of a match suspension from ten (10) days to thirty (30) days. (Tr. p. 126). While the Company proposal did not require that the parties bargain over this issue, it at least required that the Company provide information regarding its purported need for the match. Although the Union did not accept the Company's proposal, the proposal did represent a response to concerns the Union had raised in negotiations regarding its desire that the Company explain its need to suspend the match. Considering that the Company had not moved on this proposal since it began negotiating economic items on February 9, 2011, the Company's modified proposal represented even more progress.

**7. The ALJ Erroneously Found As A Matter Of Fact That The July 28, 2011 Negotiation Session Was Only “Relatively” Productive (Exception 37)**

The ALJ improperly found that the July 28, 2011 negotiation session was only “relatively” productive. (ALJ’s Decision p. 22, lines 8-9). The Company’s lead negotiator actually testified that the Union made “significant” moves during this negotiation session. In fact, he described this day as the “most constructive negotiation session since the beginning of negotiations.” (Tr. p. 63, 401, 450). The Employer also made a significant move of its own regarding a scheduling issue. (Tr. p. 452; G.C. Ex. 5, p. 87). The Employer previously had been firm in its position on this proposal since the January 13<sup>th</sup> session. (Tr. p. 452).

The Employer thought the July 28<sup>th</sup> session was so productive he wanted to keep the “progress going.” (Tr. p. 401). The parties agreed to meet again on September 2, 2011. (Tr. p. 65, 145). May thought there was a “good dialogue, good back and forth” during this meeting and wanted to continue bargaining. (Tr. p. 401, 450). May called Bolte and told him that the July 28<sup>th</sup> session was the best session the parties had engaged in since the beginning of negotiations and expressed regret that the parties could not continue negotiating. (Tr. p. 453). May talked about setting up additional bargaining dates in August. (*Id.*). The parties even began looking at weekends for negotiations, which neither party had previously considered. (Tr. p. 453-454).

Although the ALJ described the significant progress the parties made on various fronts, he nonetheless described this progress as only “relatively” productive. (ALJ’s Decision p. 22, lines 8-9). The ALJ’s mischaracterization of the progress made during this session is of particular significance because this was the last session that took place before the Company unilaterally declared impasse and insisted that the Union submit its September 2<sup>nd</sup> LBFO for a ratification vote.

**8. The ALJ Failed To Find That The Union's District 7 Director Jim Robinson Did Not Have A Negotiating Role During The September 2<sup>nd</sup> Session (Exception 38)**

The ALJ discussed the appearance of USW District 7 Director Jim Robinson at the September 2<sup>nd</sup> negotiation session in his decision. (ALJ's Decision, p. 23, lines 21-27, 29-33, 35-39, p. 24, lines 7-10, 16-20). The ALJ specifically cited the comments Robinson made about the Company's pending retirement proposals. (ALJ's Decision, p. 23, lines 21-27). However, the ALJ failed to note that Robinson did not have any role whatsoever with negotiating or bargaining with the Union. Robinson did not hold himself out as a negotiator and the Union never advised the Company that Robinson was there to bargain or that Bolte was abdicating his role as lead negotiator. (Tr. p. 75, 146, 335-336). The record is clear that Robinson attended the session to express that the International Union and the District supported the Local. (*Id.*). Consistent with this role, Robinson left after the Union presented its counter-proposal and the parties caucused. (Tr. p. 149-150, 259, 338). Because the ALJ's failure to find as a matter of fact that Robinson served no negotiating role in the negotiations, the ALJ's description of Robinson unnecessarily inflates his role.

**C. Exceptions To ALJ's Conclusions**

**1. The Company Unlawfully Refused To Continue Bargaining With The Union By Prematurely Declaring Impasse During The September 2<sup>nd</sup> Negotiation Session (Exceptions 1-26, 28-31, 33-39)**

The ALJ erred when concluding that the Employer did not violate the Act when it unilaterally declared that the parties were at impasse during the September 2, 2011 negotiation session before it subsequently locked out its bargaining unit employees on September 6, 2011.

**a. The Impasse Standard**

The Board has defined bargaining impasse as a situation when good faith negotiations have exhausted the prospects of concluding an agreement. *Royal Motor Sales*, 329 NLRB 760, 761 (NLRB 1999). Impasse is “the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile.” *AMF Bowling Co.*, 314 NLRB 969, 978 (NLRB 1994). Determination of impasse depends on the mental state of the parties. *Huck Mfg.*, 693 F.2d 1176, 1186 (5th Cir. 1982). Both parties must believe they are at the end of their bargaining rope in order for there to be a valid impasse. *See, e.g., Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993). The evidence must establish that both parties believed no further fruitful negotiations were possible. *See, e.g., Cotter & Co.*, 331 NLRB 787, 787 (NLRB 2000).

In *Grinnell Fire Prot. Sys. Co.*, 328 NLRB 585, 585 (NLRB 1999), the Board held that impasse is to be decided on the basis of the totality of the record evidence. As the court noted in *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983): “Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse . . . including bargaining concessions, implied or explicit.” Impasse typically requires an overall deadlock in bargaining. *Erie Brush & Mfg. Corp.*, 357 NLRB No. 46 (2011), 2011 NLRB LEXIS 424, at \*8 (NLRB Aug. 9, 2011). The existence of an impasse is “not lightly inferred,” and the burden of proving that a genuine impasse existed rests with the party making the contention. *See, e.g., Pratt Indus., Inc.*, 358 NLRB No. 52, 2012 NLRB LEXIS 322 at \*33 (NLRB June 5, 2012).

**b. The ALJ's Conclusion That The Parties Were At Impasse Is Erroneous**

The ALJ determined that the parties were at impasse, in part, because the Company continued to insist on the acceptance of its new retirement account and 401(k) match proposals throughout negotiations. The ALJ's determination rested on his conclusion that the Union's offer to continue bargaining was unreasonable and an "empty offer" since he found the Union had nothing left to offer on these issues. He concluded that Company lead negotiator May's statement linking impasse to another ratification vote reflected the reality that a second ratification vote was the only way to break the parties' bargaining impasse. The ALJ's conclusion that the parties were at impasse is erroneous for several reasons.

First of all, it is undisputed that the parties made significant progress up to, and including, September 2<sup>nd</sup>. The steady progress the parties made throughout negotiations establishes that they were not at impasse on September 2<sup>nd</sup>. *See Caldwell Mfg., Co.*, 346 NLRB 1159, 1171 (NLRB 2006) (finding no impasse where parties made progress during session that employer contended they were at impasse and union's many compromises during the last few meetings demonstrated willingness to make sacrifices in interest of reaching new agreement); *See also, Towne Plaza Hotel*, 258 NLRB 69, 78 (NLRB 1981) (no impasse where union had significantly reduced wage demand just two (2) weeks before). It also demonstrates that the Union justifiably believed, at the time of the September 2<sup>nd</sup> negotiations, that the parties could still reach an agreement.

In fact, the ALJ recognized that the parties made substantial progress during the parties' final two (2) bargaining sessions on July 28<sup>th</sup> and September 2<sup>nd</sup> sessions and emphasized it in his decision. (ALJ's Decision, p. 27, lines 20-25). In spite of his acknowledgement of this progress, the ALJ concluded that this progress actually underscored why the parties were

deadlocked and at impasse. (*Id.*). The ALJ incorrectly reasoned that this progress demonstrated that there was no additional room for the parties to move on the new retirement account and 401(k) match issues. (*Id.*).

It is undisputed that the July 28<sup>th</sup> session was extremely productive. May considered it to be the parties' most constructive session to date and wanted the parties to continue negotiating. (Tr. p. 63-65, 401, 450-451). The progress continued through the September 2<sup>nd</sup> session as the parties reached understandings and the Union modified certain proposals in a counter-proposal. (Tr. p. 150-154, G.C. Ex. 5, p. 95-97). The ALJ nonetheless actually considered this progress in the next to last session to be a factor that establishes that the parties were at impasse during the last session. The ALJ reached this conclusion even though the Company cut off negotiations on September 2<sup>nd</sup> shortly after the parties began bargaining and reached an agreement. (Tr. p. 66-67, 73, 77, 153, 260, 299). The ALJ's finding is counter-intuitive. The ALJ recognized that the parties were making progress through the September 2<sup>nd</sup> negotiation session, yet nonetheless relied on this progress to conclude that there was no reasonable basis for further fruitful negotiations. The Union submits that the opposite is true. The fact that the parties had made and were continuing to make significant progress establishes that further bargaining could have been fruitful at the time the Company unilaterally declared impasse and cut off negotiations. This conclusion is particularly reasonable given that the parties continued to make progress after the Company had previously submitted its initial LBFO on March 28<sup>th</sup> and that this proposal was voted down in April by a margin of 65-3. (Tr. p. 59-60, 131-132; G.C. Ex. 5, p. 79-81).

Moreover, a lack of progress on particular issues is not dispositive of whether parties are entrenched in their positions on these issues. Parties can fail to make progress on certain issues because they are in the process of resolving other issues. That is precisely what occurred in this

case. The parties reached numerous tentative agreements and either completely resolved or nearly resolved a number of significant issues, including, but not limited to: 1) wage rates; 2) health insurance; 3) the pension multiplier; 4) scheduling; and 5) numerous grievances. This undisputed progress on other issues strongly weighs against a finding that the parties were at an overall bargaining impasse on September 2<sup>nd</sup>. (G.C. Ex. 5, p. 1-5, 7-8, 35-36, 37-43, 45-46, 49-60, 61-81, 83-85, 87, 89-91, 93, 95-97, 99-101, 103-105; G.C. Ex. 10).

The overall progress the parties made is particularly significant when it is contrasted by the small amount of time that the parties devoted to resolving the new retirement account and 401(k) match proposals. The Company only began to negotiate these items during the February 9, 2011 session. As noted above, there were only three (3) full day sessions that took place after the Company began negotiating these proposals. Moreover, USW lead negotiator Bolte credibly testified that the parties only spent approximately one hour and a half on the new retirement account issue and one hour and a half on the 401(k) proposal. (Tr. p. 166-167). The Company did not rebut Bolte's testimony. As such, even if the new retirement account and 401(k) issues were significant to the parties, the record is clear that the parties did not devote a significant portion of their negotiations to these issues. Since the record establishes that the new retirement account and 401(k) match issues were just two of many issues the parties had to negotiate and that the parties were continuing to negotiate, the ALJ's finding of impasse is unreasonable.

In addition, although the ALJ downplays the progress the parties made on the new retirement account and 401(k) issues, it cannot be denied that the parties did make some progress on these issues. By the September 2<sup>nd</sup> negotiation session, the parties had engaged in productive discussions on both the new retirement account and 401(k) match issues. With respect to the new retirement account issue, the Union had advised the Company that it could accept its proposal if

the parties could find an account that provided for a better investment return than the Company's plan, conveying clearly that the Union was not opposed to the concept of a defined contribution plan. (Tr. p. 61, 134-135). Bolte spent a great deal of time researching plans and ultimately found one that offered a significantly higher investment return. (Tr. p. 165, 247, 270). With respect to the 401(k) match issue, the Union submitted a counter-proposal on March 10<sup>th</sup> that would allow the Company to suspend its match after bargaining in good faith with the Union on this issue. (Tr. p. 117-118; G.C. Ex. 5, p. 59). The Employer subsequently modified its proposal on March 28<sup>th</sup> by proposing language that would require it to meet with the Union and explain its need to suspend its matching contribution. (Tr. p. 126; G.C. Ex. 5, p. 61). The Employer's modified proposal also extended the required notice period to the Union of a match suspension from ten (10) days to thirty (30) days. (*Id.*).

Even though the ALJ failed to consider this point, the fact that the Company announced for the first time that it would not move further on the new retirement account and 401(k) match proposals during the September 2<sup>nd</sup> session further establishes that the parties were not at impasse on September 2<sup>nd</sup>. The Company's new position obviously came as a surprise to the Union. The Union had no reason to believe prior to the September 2<sup>nd</sup> session that the Company considered the parties to be deadlocked on the new retirement account and 401(k) match issues, particularly since the parties had continued to negotiate and reach agreements after the Company's March 28<sup>th</sup> LBFO had been rejected by the Union membership. There is no evidence that the Union indicated at any point in negotiations that it considered the parties to be deadlocked on the new retirement account and 401(k) match issues. The Union repeatedly stated that that the parties were not at impasse during and after the September 2<sup>nd</sup> session and never

communicated that it would not accept an offer that included the Company's new retirement account and 401(k) match proposals.

The Board has previously determined that, for a deadlock to occur in connection with a bargaining impasse, *neither party* must be willing to compromise. *See Huck Mfg.*, 693 F.2d at 1186 (ALJ's finding that union's chief negotiator never felt the parties were at impasse a determinative factor as to whether parties were at impasse). There is ample evidence that the Union remained willing to negotiate and compromise both before and after the Company declared impasse. (Tr. p. 154-156, 261, 299-300; Resp. Ex. 44). The ALJ found that the parties were at impasse because the Company would not move further on the new retirement account and 401(k) match proposals, and that the Union could not move further on these proposals. He credited the Employer's argument that May stated the reality that a second ratification vote was the only way to break the parties' impasse. This finding is fundamentally flawed, in part, because the parties were not at impasse when May made this statement.

Even if the Company was not willing to compromise on these issues, the record does not support a finding that the Union was not willing to compromise on these issues. To the contrary, the Union never advised that it would never ultimately accept these proposals. Even after the Company offered its initial LBFO on March 28<sup>th</sup>, the Union was able to obtain concessions and reach agreements. Even though the Company may never have budged on the new retirement account and 401(k) match proposals, nothing prevented the Union from seeking to obtain agreements on other outstanding issues. *See Patrick & Co.*, 248 NLRB 390, 393 (NLRB 1980) (citation omitted), *enfd. mem.* 644 F.2d 889 (9th Cir. 1991) ("bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas"). The record is clear that the Union did have room to move on these proposals because, as explained

below, it offered counter-proposals on these issues during a subsequent negotiating session on October 24, 2011. (Tr. p. 71-72, 159-166, 247, 270; G.C. Ex. 5, p. 103-105).

However, even if the Union had no room to move on these issues, the parties were not at impasse because the Union remained willing to negotiate other items and obtain other concessions from and agreements with the Company, as it had consistently done after the Company submitted its initial LBFO.

Finally, the ALJ erred by concluding that evidence of the parties' October 24<sup>th</sup> negotiations were not relevant, or, alternatively, supported the Company's argument if considered. This evidence is clearly relevant. If the parties were at impasse at the time of the lockout, the Company had no legal obligation under federal law to continue bargaining with the Union. Under Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158 (a)(5) (2012), "an employer and a union are mutually obligated 'to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment.' The duty to bargain may be suspended temporarily, however, where the parties reach a lawful impasse." *Erie Brush*, at \*7. The evidence of continued bargaining after the Company's declaration of impasse helps to establish that the parties were not at impasse because, if they had been at impasse, the Company was under no legal obligation to bargain with the Union. The ALJ erred as a matter of law by concluding that this evidence is not relevant.

The ALJ also erred in concluding that, even if this evidence is considered, that it supports the Company's argument. The Union offered proposals on both the new retirement account proposals and 401(k) match proposals. (Tr. p. 71-72, 159-166, 247, 270; G.C. Ex. 5, p. 103-105). With respect to the new retirement account, Bolte had found a fund that had paid out nearly a four (4) percent return in each of the past ten (10) years. (Tr. p. 164, 270). The Company

briefly considered this proposal during the October 24<sup>th</sup> session but decided to reject it because the investment vehicle was a 401(k) account and the Company did not want another 401(k) account. (Tr. p. 71-72,76). The Union's proposals represented movement toward the Employer's position on each of these two issues and on other outstanding contract issues. (Tr. p. 145-147, 150-152, 155-156; G.C. Ex. 5, p. 103-105). The movement toward a final agreement and the fluidity on both the new retirement account and 401(k) issues and other outstanding contract issues establishes that the parties were not at impasse.

The Company took the position that the parties were at impasse on the new retirement account and the 401(k) match proposals unless the Union submitted a proposal including these offers to its membership for a vote. It locked out the Claimants because the Union did not conduct a vote on the Company's contract proposal between September 2<sup>nd</sup> and September 6<sup>th</sup>. While no vote was held between September 2, 2011 and October 24, 2011, the parties had a negotiation session that took place after the Company had announced that the parties were at impasse absent a vote on the Company's LBFO. The parties' continued bargaining establishes that they were not at impasse at the time of the lockout. Given the position on impasse the Company announced on September 2<sup>nd</sup>, it had no reason to bargain with the Union on October 24<sup>th</sup> unless it believed that an agreement could be reached and bargaining would be fruitful. The logical inference arising from the Company's willingness to continue to bargain is that it understood that the parties were not deadlocked on the new retirement account and 401(k) match issues and were not at impasse during the September 2<sup>nd</sup> session.

**2. The Company Improperly Bargained To Impasse On A Permissive Subject Of Bargaining- The Submission Of The Company's Revised LBFO For A Ratification Vote (Exceptions 1, 2, 5-6, 10-39)**

For essentially the same reasons he relied on in finding that the Company did not prematurely declare impasse, the ALJ found that the Company did not improperly insist to impasse on a ratification vote for its September 2<sup>nd</sup> LBFO. The ALJ specifically concluded that the parties had reached a bona fide impasse at the time May made his statements linking impasse to another ratification above. (ALJ's Decision, p. 30, lines 14-16). For the reasons cited above, this finding is erroneous because the parties never reached a bona fide impasse. The ALJ's decision is also incorrect because the ALJ contorted the express and unambiguous meaning of May's impasse comments during the September 2<sup>nd</sup> session. In dismissing this allegation, the ALJ specifically found that May's statements reflected that the only way for the parties to reach a new collective bargaining agreement was for the employees to re-vote in favor of the Company's revised LBFO. (ALJ's Decision, p. 30, lines 17-20). As the ALJ explained in his discussion of the premature impasse charge, "As indicated by the Company, considered in context, the statements were obviously intended to describe, in a simple if not perfect manner, what had become the reality at that point: the only apparent way to reach a new agreement, and thereby end the impasse, would be for the employees to re-vote in favor of the LBFO." (*Id.* at p. 29, lines 34-38).

The ALJ's explanation of May's remarks should not be accepted. The ALJ mischaracterizes May's statements in concluding that May did not insist to impasse on a permissive subject of bargaining (or, for that matter, prematurely declare impasse). After returning from a caucus in which the Company negotiators privately discussed the Union's latest counter-proposal, May stated that, short of the Union taking the Employer's September 2<sup>nd</sup>

proposal back for a vote, the parties were at impasse. (Tr. p. 67, 77, 153, 260, 299). Bolte asked May to clarify his position. (Tr. p. 154). Bolte said: “[I]s your position if we vote on the last, best and final offer then we’re not at impasse? But if we don’t vote on this LBFO then we are at impasse?” (Tr. p. 154, 299-300). May responded: “That’s our position.” (Tr. p. 154, 300). May confirmed that the impasse was based on the last, best and final offer going to a vote or not going to a vote. (Tr. p. 154). Bolte told the Union bargaining committee to get down everything that was said because the Employer was not going to dictate when the employees would vote. (Tr. p. 154).

Although the ALJ goes to great lengths to explain May’s statement, it is, in fact, patently obvious that the Company was insisting to impasse on whether a second ratification vote would take place. May’s words do not need to be analyzed in any depth because they could not be more clear. May said not once, but twice, that the parties were at impasse if the Union did not take the proposal back for a vote, but were not at impasse if the Union did take the proposal back for a vote. This conditional statement actually supports both of the charges the ALJ dismissed. By making impasse conditional on whether the Union submitted the Company’s LBFO to a ratification vote, May tacitly recognized that the parties were not at impasse. Impasse is an actual reflection of whether the parties are deadlocked such that further discussion cannot be fruitful. It is not contingent on whether the Union submits a proposal for a ratification vote. Because May recognized that, at a minimum, the parties were not definitely at impasse, his words demonstrate that he knew the parties were not deadlocked.

Alternatively, if the parties did reach a bargaining impasse, it reached this impasse because the Company insisted to impasse that the Union submit its revised LBFO for another ratification vote. May made this clear by saying that the parties were not at impasse if the Union

submitted the proposal for a ratification vote but were at impasse if they Union did not submit the proposal for a vote. Although May's express and unambiguous words do not need context because they can be comprehended without detailed analysis, they provide even more support for finding of an unfair labor practice when the evidence regarding the Company's intentions is viewed. After the parties' most productive session on July 28<sup>th</sup>, May testified that the Company learned that some employees wanted another vote. The parties had not even bargained very long on September 2<sup>nd</sup> when May abruptly made his statement regarding impasse. Although the Company had never before stated the belief that the parties were at impasse – even after an initial LBFO was voted down overwhelmingly- the Company now contended that the parties were at impasse unless the Union took the proposal back for another ratification vote. The Company thus obviously went into the September 2<sup>nd</sup> negotiations intent on securing another ratification vote. The record evidence, including May's own words, demonstrates that the Company insisted and demanded that it receive this vote until the parties reached a bargaining impasse.

The ALJ accepted the Company's argument that May was expressing that a vote was the only way to break the parties' deadlock. The ALJ's explanation of May's statement is not only unsupported by the record evidence but also illogical. Even setting aside the ample evidence that shows the parties were not at impasse when May made his statement and assuming *arguendo* that the parties were at impasse, a ratification vote was not the only way to break the parties' purported impasse. Since the Union remained willing and able to bargain, the parties could have reached a final agreement if the Company remained willing to bargain and the Union accepted the Company's proposals. Moreover, it is not even reasonable to infer that May was stating that a vote would have broken the parties' alleged impasse. By the September 2<sup>nd</sup> session, it was, of course, obvious to all parties that if the Union members voted on and ratified a contract proposal,

the parties would not be at impasse. That statement simply did not need to be made by May- it was obvious to all. Thus, May was not making such a statement during the September 2<sup>nd</sup> meeting. As his words undoubtedly demonstrate, he was insisting to impasse that the Union submit its proposal for another ratification vote.

### **3. The Employer's Violations Of The Act Tainted Its Lockout**

Unremedied unfair labor practices can taint an employer's bargaining position and render a lockout in support of that position unlawful. *See, Allen Storage & Moving Co.*, 342 NLRB 501, 501 (NLRB 2004). As explained above, the parties were not at impasse when the Employer unilaterally declared impasse on September 2<sup>nd</sup> and refused to bargain with the Union. In the absence of impasse, an employer, as here, may not lock out its employees while simultaneously violating Section 8(a)(1) and (5) of the Act by refusing to bargain. *See Assn. of D.C. Liquor Wholesalers*, 292 NLRB 1234, 1236-37 (NLRB 1989), *enfd. sub. nom. Teamsters Local 639 v. NLRB*, 924 F.2d 1078 (D.C. Cir. 1991). *See also, Bob Showers Windows & Sunrooms, Inc.*, 2005 NLRB LEXIS 589 at \*90 (NLRB Dec. 14, 2005) (lockout was fruit of poisonous tree of unlawful bargaining, in part, because employer prematurely declared impasse); *Royal Motor Sales* at 765-766 (lockout merely served as preliminary step in unlawful implementation because parties were not at impasse and could not have been at impasse given unremedied unfair labor practices); *See also, Clemson Brothers, Inc.*, 290 NLRB 944, 945 (NLRB 1988) (employer was engaged in bad faith bargaining at point when it initiated the lockout and maintained lockout while continuing to refuse to bargain in good faith with the Union).

Additionally, an employer's insistence to impasse on a permissive subject of bargaining (e.g. employee ratification of a contract proposal) can taint a subsequent lockout. *See Movers and Warehousemen's Assn. of Metropolitan Washington, D.C., Inc.*, 224 NLRB 356, 357 (NLRB

1976), *enfd.* 550 F.2d 962 (4th Cir. 1977) (Board affirmed the administrative law judge's ruling that the employer's lockout had a dual objective- to bring economic pressure to bear on the Union and to coerce the Union into adopting its proposed procedure for ratification of the contract being negotiated). The ALJ should have concluded that the Company violated the Act by refusing to bargain and subsequently locking out its employees in support of its demand on the non-mandatory subject of bargaining of contract ratification.

**V. CONCLUSION**

For the foregoing reasons, the Union asks that the Board overrule and not adopt the portions of the Administrative Law Judge's Decision, Findings of Fact, and Conclusions of Law to which it excepts. Furthermore, the Union asks that the Board find that Company committed unfair labor practices under 8(a)(1), (3) and (5) by both prematurely declaring impasse and insisting to impasse on the permissive subject of bargaining of the Union's decision whether to hold a vote on the ratification of the Company's LBFO. The Union also urges the Board to find that these unfair labor practices were committed prior to and unlawfully tainted the Company's lockout of the bargaining unit employees. The Union requests that the Board award all appropriate relief to compensate the bargaining unit employees for the damages they incurred, including backpay.

Respectfully submitted,

/s/ Robert A. Hicks

Robert A. Hicks

Richard J. Swanson

**MACEY SWANSON AND ALLMAN**

445 North Pennsylvania Street, Suite 401

Indianapolis, IN 46204-1800

Phone: (317) 637-2345  
Fax: (317) 637-2369  
E-mail: [rhicks@maceylaw.com](mailto:rhicks@maceylaw.com)  
[rswanson@maceylaw.com](mailto:rswanson@maceylaw.com)

Attorneys for the Union

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that he served the foregoing Post-Hearing brief of the Union on the following via e-mail and first-class United States mail, postage pre-paid, this 5<sup>th</sup> day of November, 2012:

Jason Kim  
Howard Bernstein  
Counsel to Charged Party  
Neal, Gerber & Eisenberg LLP  
Two North LaSalle Street, Suite 1700  
Chicago, Illinois 60602-3801  
[jkim@ngelaw.com](mailto:jkim@ngelaw.com)  
[hbernstein@ngelaw.com](mailto:hbernstein@ngelaw.com)

Derek Johnson  
Counsel to the General Counsel  
National Labor Relations Board  
575 N. Pennsylvania Street, Room 238  
Indianapolis, IN 46204-1577  
[Derek.Johnson@nrlrb.gov](mailto:Derek.Johnson@nrlrb.gov)

/s/ Robert A. Hicks  
Robert A. Hicks

**MACEY SWANSON AND ALLMAN**  
445 North Pennsylvania Street, Suite 401  
Indianapolis, IN 46204-1800  
(317) 637-2345  
[rhicks@maceylaw.com](mailto:rhicks@maceylaw.com)